84-51

No. ____

IN THE

Supreme Court of the United States

1984 TERM

FLAV-O-RICH, INC.,

Petitioner,

v.

NORTH CAROLINA MILK COMMISSION, HERBERT C. HAWTHORNE, VILA M. ROSENFELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT CHARLIE L. HARDEE, INEZ M. MYLES, B.F. NESBITT, KATHRYN G. KIRKPATRICK, AND DAVID A. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the courts below have erred in applying the standards announced by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943) ("*Parker*") and *California Retail Liquor Dealers* v. *MidCal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*MidCal*") with the result that the North Carolina Milk Commission ("Commission"), its members and staff continue to squelch price competition in the sale of fluid milk products in North Carolina in *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980)?

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Petitioner, Flav-O-Rich, Inc. ("FOR"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-referenced case on April 12, 1984.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit was filed on April 12, 1984, No. 83-2066. The opinion and judgment of the United States District Court for the Eastern District of North Carolina were entered October 27, 1983, No. 82-1172-CIV-5, but are not yet reported. The opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 12, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1980).

STATUTORY PROVISIONS INVOLVED

The question presented by this case involves the applicability of the proscriptions of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1980), to the price stabilizing activity of the Commission, its members and staff.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On October 18, 1982, FOR filed the Complaint in this action against the Commission and its members asserting jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1332(b), 1337, and 1343. The complaint sought injunctive and declaratory relief from the enforcement of any statute, regulation, or Commission policy which caused, or was used by the Commission, its staff or members, to force FOR to divulge its confidential cost and price information to its competitors, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

On October 22, 1983, the district court entered an Order and Memorandum Opinion concluding that the respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to this Court's holding in *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969). The district court found specifically that the milk industry in North Carolina is similar to the container industry in its marketing conditions and concluded that the exchanges of proprietary price and cost information by the staff and members of the Commission tend to

stabilize wholesale milk prices in the milk industry in North Carolina in *per se* violation of § 1 of the Sherman Act. However, then the district court also held that the conduct at issue met the requirements for antitrust exemption enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943) ("*Parker*") and granted summary judgment for the respondents and against FOR. (App. at 3a). On appeal, the Court of Appeals affirmed the district court in an unpublished *per curiam* opinion issued on April 12, 1984. (App. at 1a). The Court of Appeals affirmed by referring to the reasoning and conclusions of the district court.

B. Statement of Facts.

FOR, an agricultural cooperative association organized and existing under the laws of the Commonwealth of Kentucky, is a subsidiary of Dairymen, Inc. ("Dairymen"). Dairymen is also an agricultural cooperative association organized and existing under the laws of the Commonwealth of Kentucky. Dairymen has approximately 8,000 dairy farmer members in seventeen states, including approximately 400 in North Carolina.

FOR is authorized to do business in eleven states, including North Carolina. It has three operating divisions and milk processing plants in North Carolina, located in Durham, Greensboro, and Wilkesboro. Each of these three divisions has a separate license to distribute milk in North Carolina. The Commission exists pursuant to the provisions of Article 28B of Chapter 106 of the North Carolina General Statutes. The Commission, its staff and members have only those powers which are specifically set forth therein. *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976) ("*Arcadia*"). The purpose of the Commission, as conceived by the North Carolina General Assembly and as stated in the Commission's own rules and regulations, is "to ensure the con-

sumers of North Carolina an adequate supply of milk." 4 North Carolina Administrative Code 7.0101. Its members are equally divided between five milk industry representatives (two milk producers, two milk processor representatives, and one milk retailer) and five non-milk industry representatives. N.C.G.S. (North Carolina General Statutes) § 106-266.7(a).

On November 10 and December 8, 1981, and May 3, 1982, the members and staff of the Commission requested that the Durham division of FOR disclose prices charged by it to certain of its customers. Disclosure of this information to the members and staff of the Commission would have been tantamount to public disclosure and would have had a detrimental effect on competition. Accordingly, FOR declined to produce the requested information. On October 12, 1982, the Commission suspended the license of FOR's Durham division to distribute milk in North Carolina, effective November 12, 1982, for its refusal to produce the pricing records. FOR immediately filed this action.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the Writ sought by FOR. First, the courts below, in deciding a critical issue of federal law—the applicability of the antitrust laws which protect our free enterprise system—have erred in applying the standards announced by this Court in *Parker*. Supreme Court Rule 17.1(c). Second, in determining that the price stabilizing activities of the Commission, its members and staff were exempt from the antitrust laws, the Fourth Circuit has rendered a decision which is in direct conflict with the decisions of the Ninth Circuit in *Knudsen Corp.* v. *Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982) ("Knudsen") and *Miller* v. *Ore-*

gon Liquor Control Commission, 688 F.2d 1222 (9th Cir. 1982). Supreme Court Rule 17.1(a).

We discuss each of these reasons in turn.

I.
THE COURTS BELOW HAVE MISCONSTRUED THIS COURT'S DECISIONS DEFINING THE SCOPE OF THE STATE ACTION EXEMPTION TO THE ANTITRUST LAWS

This Court first articulated the state action exemption to the antitrust laws in *Parker*. At issue in *Parker* were mandatory participation marketing proration programs imposed upon the state's raisin growers by a state commission. This Court upheld the commission's authority to impose the program on the raisin growers because the Sherman Act regulates only conduct of individuals and not the conduct of states, unless such state conduct impairs national control over commerce. To qualify for exemption, *Parker* held that state action must "derive its authority and efficacy from the legislative command of the state" and not be "intended to operate or become effective without that command." Thus, *Parker* did not grant a blank check to states or their instrumentalities. Unless challenged actions are pursuant to the explicit legislative command of the state, they are not exempt. This Court has frequently recognized that the *Parker* antitrust exemption should be strictly construed in that such fundamental antitrust policies as established in the Sherman Act should not be displaced unless the two policies are clearly repugnant. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978).

Subsequent to *Parker*, this court has, in reviewing numerous claims for the state action exemption, considerably clarified the scope of its ruling in *Parker*.

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *reh. denied*, 423 U.S. 886 (1975), the Court imposed liability upon a state agency, the Virginia Bar, where anticompetitive activities in conjunction with its statutorily authorized power in such conduct did not amount to an act of the sovereign state. In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), this Court held that parties other than the state could not claim *Parker* exemption unless such conduct was compelled by the state and that such compulsion was explicit. The holding in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), *reh. denied*, 434 U.S. 881 (1977), defined what is meant by a sovereign act. The court permitted conduct similar to that in *Goldfarb* becuase that conduct was explicitly demanded by the Arizona Supreme Court in its exercise of its sovereign control over the practice of law in that state. In *Lafayette* v. *Louisiana Power and Light Company*, *supra*, the court held that cities, political subdivisions, agencies, and other entities inferior to the sovereign state were subject to the antitrust laws unless such conduct was undertaken pursuant to a state's explicit policy and under a state's active supervision. *Lafayette* further held that the anticompetitive nature and effect of the act had to have been contemplated by the sovereign in order to enjoy *Parker* exemption.

These holdings were synthesized in *California Retail Liquor Dealer Association* v. *MidCal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*MidCal*"). There, the California statute at issue required wine wholesalers to file price schedules with the state and further prohibited the sale of wine below the prices set forth in those schedules. MidCal, a wine wholesaler, was charged with selling wines for which no price schedule had been filed and with selling other wines at prices less than the prices set by the price schedules which had been filed. It sought to enjoin the statute on the grounds that it violated the Sherman Act.

The lower court agreed and enjoined enforcement. The issue presented for review by this Court was whether the California pricing program was exempt from Sherman Act scrutiny by reason of the *Parker* exemption. In holding that the exemption was not available, this Court laid down the following two-prong test:

> First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.

445 U.S. at 105.

This Court then ruled that the California wine pricing system satisfied the first prong by forthrightly stating its purpose to permit resale price maintenance, but that it did not meet the second requirement of active supervision by the state. It held:

> The State simply authorizes price-setting and enforces the prices established by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' (citation omitted.)

445 U.S. at 105-106.

MidCal thus made it clear just how narrow the state action exemption set forth in *Parker* is. To pass the *MidCal* test, the challenged restraint of trade must, first, be undertaken pursuant to a clearly articulated and affirmatively expressed state policy, and, second, be actively supervised by the state itself.

Finally, in *Hoover* v. *Ronwin*, ____ U.S. ____, 80 L.Ed.2d 590 (1984) ("*Ronwin*"), this Court held that a significant degree of independence between the state and the challenged agency requires a further analysis of the

specific complained of act to determine whether such act can fairly be said to be that of the state itself. This analysis is conducted through the use of the two-pronged *MidCal* test. This Court reasoned that:

> Closer analysis is required when the activity at issue is not directly that of the legislature or Supreme Court, but is carried out by others pursuant to state authorization. *See, e.g., Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982); *California Liquor Dealers* v. *MidCal Aluminum*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California* v. *Orrin W. Fox Company*, 439 U.S. 96 (1978). In such cases, it becomes important to insure that the anti-competitive conduct of the State's representative was contemplated by the State. *City of Lafayette* v. *Louisiana Power and Light Company*, 435 U.S. 389, 413-415 (1978); *see New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 369-70 (9th Cir. 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. . . . The court also has found the degree to which the state legislature or Supreme Court supervises its representative to be relevant to the inquiry. *See MidCal Aluminum, supra*, at 105, 63 L.Ed.2d 233, 100 S.Ct. 937; *Goldfarb, supra*, at 791, 44 L.Ed.2d 572, 95 S.Ct. 2004. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or Supreme Court, we need not address the issues of "clear articulation" and "active supervision."

80 L.Ed.2d at 599-600.

The independence of the Commission in the case at bar requires the specific conduct at issue must also pass both prongs of the *MidCal* test and the activity of the Commission, its members and staff at issue is this action fails to

satisfy either of the two-prongs of the *MidCal* test. For the following reasons, the lower courts erred in reaching an opposite conclusion.

A. The Lower Courts Erred In Holding That The Activity Of The Commission, Its Members And Staff At Issue Is This Action Met The First Part Of The Two-Prong MidCal Test.

The first prong of the *MidCal* test requires that the state's policy with regard to the challenged action be "clearly articulated and affirmatively expressed." In this case, the conduct which the lower courts held to be in violation of the Sherman Act is the exchange of price and cost information among the Commission members and staff, FOR's competitors and even the public. As FOR established in the lower courts, this restraint of trade has not been undertaken pursuant to a clearly articulated and affirmatively expressed state policy authorizing such exchanges of price information. The North Carolina legislative scheme grants to the Commission the authority to set minimum and/or maximum wholesale milk prices in North Carolina if it ever desires to implement a program to do so fairly and with proper notice. The Commission, however, has never done so. In fact, in addition to failing to implement that policy, it explicitly violates another clearly articulated state policy.

N.C.G.S. § 106-266.8(12) *specifically prohibits* the public dissemination or exchange of price and cost information by the Commission, its members and/or staff. That statute provides that the Commission may make such information public *only after it is combined with other such information for a given milk market or markets*. Clearly, the North Carolina General Assembly has recognized that the dissemination of information with respect to specific prices and costs would have an anti-

competitive effect on the North Carolina wholesale milk industry, and that is why it required the Commission to "combine such information" with other information before making it public. In other words, while publication of data containing totals and averages for a market or markets is permitted, the publication of individual data is expressly prohibited.

N.C.G.S. § 106-258 is even more explicit. That statute provides:

> Any individual plant records shall be treated as confidential by anyone handling them, and such individual records shall not be published or made accessible to any unauthorized person or representative.

Nevertheless, as established in the lower courts, the Commission and its staff do share with other processors and even the public the cost information obtained from milk processor records. Such anti-competitive conduct is neither required nor authorized by the state and, in fact, is proscribed by the state, and is thus in direct *contravention* of state policy. Certainly, such conduct does not meet the first prong of the *MidCal* test, and the lower courts erred in so concluding.

Further, had the North Carolina legislature contemplated or anticipated such exchanges, it would not have required that plant price and cost records be treated confidentially. Because such confidentiality is explicitly required by N.C.G.S. § 106-258 as to such records, the legislature did not intend (and it therefore is not the policy of the state) to allow the free exchange and dissemination of the proprietary information contained in those records and the stabilization of milk prices in this fashion. Directly on point is *Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982), where this court found that:

tions Company v. *City of Boulder*, 455 U.S. 40 (1982), where this court found that:

> A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can these actions be truly described as 'comprehended within the powers *granted*,' since the term 'granted' necessarily implies an *affirmative addressing* of the subject by the State. (Emphasis by the court and added.)

455 U.S. at 55.

Likewise here, the exchanges of proprietary price and cost information in which the Commission, its members and staff have engaged are not within the powers granted to the Commission by the North Carolina legislature.

Even if the district court below had determined that the statutes authorized the Commission to regulate processor or wholesale milk prices in North Carolina, it does not necessarily follow that the Commission could do so in an anti-competitive fashion. As this Court noted in *City of Lafayette* v. *Louisiana Power & Light Company*, *supra*,:

> . . . [E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.

435 U.S. at 417.

Clearly, in the instant case, the legislature did not contemplate the manner in which the Commission, its members and staff have sought to disseminate price data. First, as already stated, the legislature has expressly prohibited the exchange of individual processor prices. Second, while the legislature has authorized the fixing of processor prices, it conditioned its authorization with a requirement that the Commission first hold a public hear-

ing. N.C.G.S. § 106-266.8(10)b. To be sure, the legislature did not intend for the Commission, its members and staff and the state's processors to fix prices through private meetings, telephone conversations and correspondence.

Furthermore, the anti-competitive conduct in disseminating this pricing information to stabilize prices is contrary to the statement of public policy contained in the North Carolina Statutes creating the Commission. As provided in N.C.G.S. 106-266.19, the purpose and policy of the State of North Carolina in passing the milk law is to *preserve* competition, not destroy it. As this below cost sales prohibition indicates, it is the purpose of the Commission to prevent the destruction of competition in the milk industry in North Carolina. The anti-competitive conduct at issue in this action could hardly be less consistent with this statement of the state's public policy and the courts below erred in failing to so recognize.

Although the lower courts correctly recognized that no North Carolina policy authorizes the exchanges of price and cost information challenged by FOR, the courts nevertheless concluded that this illegal conduct met the first prong of the *MidCal* test for antitrust protection because the prohibited dissemination of price and cost information that occurred was somehow "incidental" to other specific powers granted to the Commission by the North Carolina legislature. Thus, the lower courts held that the price information exchanges, which result only "incidentally" from the Commission's powers, are somehow authorized pursuant to a "clear ly articulated policy" of the state. As established, any exchange of price information is specifically prohibited by the legislature. That being so, the legislature could not have intended that the Commission, its members and staff could avoid that specific prohibition as an "incidental" part of other

provisions of the statute. Furthermore, even if the legislature had so intended, that intent could, under no stretch of the imagination, be said to be "clearly articulated and affirmatively expressed" as required by *MidCal*. Indeed, to conclude that "incidental" price exchanges are part of a "clearly articulated and affirmatively expressed" state policy is a contradiction in terms. Such a conclusion extends the protection of *Parker* far beyond the limits established by this Court in *MidCal* and is clearly in error.

Even if the "incidental" standard developed by the lower courts in their decisions is the correct standard, the lower courts' application of that standard to the *facts* of this case is in error. FOR established in the district court that the Commission disseminates confidential price and cost information in five ways. As to each, the lower courts held that they occurred "incidental" to specifically enumerated powers granted to the Commission by the legislature. However, as to each type of exchange, the lower courts have clearly erred in so concluding.

For example, FOR proved, and the district court found, that price information has been repeatedly and continuously exchanged between certain processors and the Commission staff through a procedure whereby the processors report to the Commission the wholesale prices charged by themselves and their competitors in a given market. (App. at 5a.) The unlimited exchange of pricing information is then used by FOR's competitors and the Commission to stabilize wholesale milk prices in that area by notifying each other of the price and bringing about price alignment in the market. While the lower Courts found that such exchanges violated Section 1 of the Sherman Act, they also held that they were the direct result of attempts by the Commission to prevent below-cost sales, one of its legislatively enumerated powers. However, in no way are the exchanges between processors and Com-

mission staff necessary to the enforcement of the below-cost statute or the prevention of below-cost sales or any other stated policy and they serve no legitimate purpose. Indeed, as noted above, such exchanges are expressly prohibited by the confidentiality requirements of the Commission's regulations, which apply with equal strength to the Commission's below-cost functions. Certainly, such exchanges are not pursuant to any state policy and are not entitled to *Parker* exemption.

In another example, FOR established to the satisfaction of the District Court that price exchanges occur between processor representatives and members of the Commission staff at various processor meetings called by the Commission. (App. at 5a.) Those meetings have included meetings of the "Eleven Man Committee," all of whose members are representatives of competing processors, the "Processor Information Committee," all of whose members are representatives of competing processors, and several occasions where representatives of competing processors were directed to meet with the Commission's "Cost Procedure Committee." Indeed, as indicated hereinabove, the use of below cost investigations and the filing of price and cost data in connection therewith as a method of "stabilizing the industry" was suggested by one of these processor committees. Such price exchanges are clearly *not* contemplated by the statute authorizing such meetings. The fact that, as the District Court found, *meetings* with processors to discuss investigations and hearings and retail and wholesale prices may be within the legislative mandate, certainly does *not* authorize the price exchanges at such meetings in order to stabilize the North Carolina wholesale milk market. Price exchanges at such meetings can have no other purpose. The application of an "incidental" standard to find such unauthorized and illegal activity at those

meetings protected under the Sherman Act is clearly in error.

As previously established by FOR and as found by the district court, the North Carolina milk industry is highly competitive and is characterized by a small number of sellers, a large number of buyers, little perceptible difference between brands of milk, and an atmosphere in which the primary means of competition among processors is aggressive pricing. (App. at 5a.) The District Court also found that although small or moderate fluctuations in price do not have a significant effect on the total volume of milk and dairy products sold in North Carolina, competition through price is significant in North Carolina to the extent that the individual seller may increase its share of the market by taking customers away from its competitors. (*Id.*) Further, with the obvious short shelf-life of milk, milk orders are, by necessity, placed on the basis of short-term needs. (*Id.*) Having made such findings and concluding that FOR established each of the factual and legal criteria necessary to prove a violation of the Sherman Act, it was error under these facts for the lower courts to protect the challenged conduct due to it being "incidental" to a clearly expressed policy of the state. The price exchanges established in this case occurred well outside the legislative mandate of the Commission and they clearly are not part of any clearly expressed and affirmatively stated state policy to stabilize wholesale milk prices in North Carolina through such exchanges.

The lower courts clearly erred in holding that the first prong of the *MidCal* test has been met in this case. The conduct at issue in this action is not pursuant to any clearly stated and affirmatively expressed policy of the state of North Carolina. In fact, it is contrary to the stated policies of the state. The lower courts erred and

the judgment entered by the district court in favor of the Commission should be reversed and judgment entered for FOR.

B. The Lower Courts Erred in Holding that the Activity of the Commission, its Members and Staff at Issue in this Action Met the Second Part of Two-Part MidCal Test.

The second prong of the *MidCal* test was analyzed only briefly by the lower courts. They found that because the Commission must hold regular meetings, N.C.G.S. § 106-266.7(j), and because of its supervision of the below-cost statute with its consequent flow of price and cost information brought about this litigation, that "this supervision clearly meets the second prong of the test." This conclusory statement does not adequately or accurately address the requirement of the second prong of the *MidCal* test, and is in error.

MidCal specifically requires that for the applicability of the *Parker* exemption, the challenged restraint of trade must be "actively supervised *by the state itself.*"

This requirement is not satisfied by a carte blanche grant of regulatory powers which permit industry representatives to regulate themselves. The reason for such a rule is simple. If the state merely turned its power over to representatives of the industry to be regulated, the industry would be regulated in the interest of the industry and not in the interest of the public. That is precisely what has happened here.

As established in the district court, the primary loyalty and accountability of at least half of the members of the Commission are to the sectors of the milk industry by whom they are employed and not to the state or to the public intended to be represented by the state. In other words, these Commissioners lack the "independence"

from the industry that has historically been required of state agencies for *Parker* immunity. In such a case, the state's policy cannot be said to be "actively supervised by the state itself."

It is precisely this lack of independence that distinguishes *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) reh. den. 423 U.S. 886 (1975) ("*Goldfarb*"), from *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) reh. den. 434 U.S. 881 (1977) ("*Bates*"). In *Goldfarb*, the state agency claiming the state-action exemption for the fixing of lawyer's fees was the state bar association, an association of lawyers. This, the court said, meant that the lawyers and not the state were regulating the fees. The industry representatives on the Commission, given their interest and lack of affiliation with the state, are in precisely the same role as the members of the State Bar of Virginia in *Goldfarb*. As noted by this Court in *Ronwin* at n.20:

> . . . Goldfarb involved procedures that were not approved by the state supreme court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.

On the other hand, in *Bates*, the regulation of the advertising regulations alleged to violate the Sherman Act was by the Arizona Supreme Court, a state agency clearly independent of the lawyers being regulated. Thus, the regulatory scheme in *Goldfarb* failed while the one in *Bates* passed muster in this Court.

Clearly, *Goldfarb* and not *Bates* is applicable to the instant case. The State of North Carolina itself has never actively supervised the unlawful exchanges of information at issue in this action.

Moreover, the exchanges of information at issue in this action are accomplished by the Commissioners acting both individually and in conjunction with other private parties industry representatives. The state cannot give immunity to private parties under the Sherman Act simply by authorizing them to violate the Act. *MidCal, supra; Goldfarb, supra.*

Under all the facts of the instant case, it is clear that the acts complained of are not exempt from the Sherman Act. First, the state clearly does not have a policy against free competition in the milk industry. The Supreme Court of North Carolina has expressly stated that the "below cost" statute which respondents contend authorize their action is intended to *promote* competition and not to destroy it. *Appeal of Arcadia Dairy Farm, Inc., supra.* Furthermore, although the members of the Commission have from time to time recommended to the Commission that it limit competition by setting minimum and maximum wholesale prices for milk processors, the Commission has never done so. Second, it is clear that the persons engaged in the unlawful exchange of information are not adequately supervised *by independent state officials.* To the contrary, one-half of the members of the Commission are financially interested in their decisions and certainly cannot be said to be "independent." The acts complained of in this case are not the acts of the state but rather the acts of financially interested individuals. Such activity is not state supervision.

The decision in *MidCal* strongly supports this result. As noted above, this Court there held that:

> The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither es-

> tablishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. *The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.* As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' (emphasis added.)

445 U.S. at 105-106.

Furthermore "active supervision of the state itself" is not, as the lower courts assumed, merely active enforcement of the challenged program. The programs challenged in *MidCal*, *City of Lafayette*, *supra*, *Cantor* v. *Detroit Edison Company*, *supra*, and *Community Communications Company* v. *City of Boulder*, *supra*, were all actively enforced by the cities, boards and agencies involved, or else they never would have been challenged. Yet, in each instance, the challenged conduct was found not to be entitled to *Parker* exemption as there was a failure in each instance to show "active supervision by the state itself". Such a rule is logical. Otherwise, anyone who had injury by reason of illegal or unauthorized enforcement sufficient to show standing to bring such an action would immediately be blocked by the *Parker* exemption. This Court never intended such a result and the *MidCal* test would be meaningless if that were the rule to be applied. Indeed, there would have been no standing to challenge the program in the first place unless the program had been actively enforced against the individual bringing the action.

Thus, the lower courts' holding that the second prong has been satisfied merely due to the unauthorized activity

proved in the record of this action would lead to the inevitable conclusion that the very existence of a cause of action implies the satisfaction of *MidCal's* second prong. This interpretation would nullify the second prong of *MidCal* altogether if allowed to stand. Governmental and quasi-governmental entities composed, as here, of individuals with active special interests, should not be allowed to escape antitrust scrutiny simply because: (1) they have a general regulatory mandate; and (2) an action exists against them implying active enforcement in satisfaction of *MidCal*. The lower courts have incorrectly shielded the Commission and its members, with the very "gauzy cloak" that *MidCal* deemed insufficient.

Finally, it is not the active supervision of the below-cost statute of which FOR complains in this action. FOR instead complains that it has proven the unauthorized dissemination and exchange of proprietary price and cost information by the Commission, its members and staff, and the subsequent illegal stabilization of wholesale milk prices in the North Carolina milk industry, all in *per se* violation of Section 1 of the Sherman Act, and that it is *unable to obtain relief* from that violation. The exchanges permitted by the lower courts in this case are not only *not* part of the state's legislatively mandated policy to the Commission, but they are expressly forbidden by the confidentiality requirement of the Commission's own regulations.

FOR respectfully submits that the decisions of the lower courts are in error and should be reversed and judgment entered for FOR.

II.

THE FOURTH CIRCUIT'S DECISION APPLYING THE TWO PRONGS OF THE MIDCAL TEST CONFLICTS WITH HOLDINGS OF OTHER COURTS OF APPEALS.

A. The Fourth And Ninth Circuits Directly Conflict In Their Interpretation of the First Prong of the MidCal Test.

The Fourth Circuit, in this case, has created a conflict with the Ninth Circuit in its interpretation and application of the first prong of the *MidCal* test and in its application of the *Parker* exemption.

The Ninth Circuit strictly construes both prongs of *MidCal*. *Knudsen Corporation* v. *Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982) ("*Knudsen*") is the only federal circuit court of appeals opinion involving a discussion of the *Parker* exemption issue as it relates to the operation of a state dairy commission. In that case a manufacturer and distributor of dairy products challenged the Nevada Dairy Commission alleging that through that Commission, the state was mandating a price filing system promoting horizontal price fixing which restrained competition in the Nevada dairy market. The district court issued a preliminary injunction and the Court of Appeals affirmed. The Nevada Dairy Commission unconvincingly argued that there was a clearly stated and articulated Nevada policy to stabilize the prices of dairy products and that therefore it was entitled to the protection of *Parker*. Applying *MidCal*, the Ninth Circuit concluded that the Commission was not protected by *Parker*, reasoning that although the Nevada Dairy Commission is authorized by statute to do so, it does not set wholesale prices but simply enforces privately set prices through the mechanism of advance filing. Further, the court found that the public disclosure of cost and price documents, "appears also to inhibit and constrain price competition in the dairy industry."

In another recent Ninth Court case, *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983) ("*Title Insurance*"), the court held that the *first* prong of *MidCal* is not satisfied even where the state statute authorizes cooperative action in rate making. The statutory language in *Title Insurance*, although it listed factors to be considered in setting rates, was held to be insufficient to show a clearly articulated and affirmatively expressed state policy.

In contrast, the Fourth Circuit is substantially more liberal in interpreting the first prong of *MidCal*. As is evidenced by the decision of that court below, the Fourth Circuit expansively interprets the first prong of *MidCal* so as to extend the *Parker* exemption far beyond the protection contemplated by this Court in *Parker*. The Fourth Circuit requires virtually no showing in order to establish a clearly expressed and articulated policy for the first prong by protecting unauthorized and in fact prohibited conduct taken by the members and staff of the Commission from antitrust scrutiny.

In support of this holding, the lower court cites *Princeton Community Phone Book* v. *Bate*, 582 F.2d 706 (3d Cir. 1978), *a pre-MidCal decision*, stating that the policy of the state may be demonstrated by explicit language in the statutes *or* it may be *inferred* from the nature of the powers and duties conferred the agencies. However, the court of appeals below then liberalizes even this highly questionable *pre-MidCal* holding by concluding that since the acts complained of in this case were "incidental" to expressly authorized acts then they are to be protected whether they are prohibited by other statutory provisions or state policy or not. Therefore, the court avoids altogether the question of whether the specific conduct complained of in this case is protected by a state policy. It is difficult to imagine what conduct by any state agency or

its members or staff would not enjoy the benefits of the *Parker* exemption under this broad interpretation of *MidCal* adopted by the Fourth Circuit. This is especially true given that virtually all conceivable actions by such an agency or its members or staff could be deemed to be, in some way, "incidental" to expressly authorized actions.

The disagreement over the interpretation of the first prong of *MidCal*, from the strict interpretation of the Ninth Circuit to the very liberal interpretation by the Fourth Circuit (as is evidenced by this case), leads to inconsistency of application and therefore inconsistency of result. This inconsistency leads to uncertainty as to which actions are proscribed and which are not. This Court should grant certiorari to clarify the proper standards for application of the first prong of *MidCal*.

B. The Fourth Circuit's Decision In This Action Also Conflicts With the Ninth Circuits' View Of The Second Prong Of The MidCal Test.

MidCal also requires, before the state action exception may be applied, that the clearly articulated and affirmatively expressed state policy must be "actively supervised by the state itself". 445 U.S. at 105.

As with the first prong, the Fourth Circuit has staked out a position in conflict with that of the Ninth Circuit in articulating the standards to govern application of prong two of the *MidCal* test. The Ninth Circuit in *Miller* v. *Oregon Liquor Control Commission*, 688 F.2d 1222, 1226-27 (1982) required "pointed reexamination" by the state and "reviews of reasonableness" as to how the state policies are being effectuated in order for the active supervision requirement of *MidCal* to be met. Such an

interpretation is required by the clear language of *MidCal*. The Ninth Circuit specifically held:

> The wholesalers and the commission argue that Oregon law, like Virginia law, completely controls the distribution of liquor within the state's boundaries and should therefore be immune from the Sherman Act under *Parker*. We disagree. The Oregon beer and wine pricing program resembles the California wine pricing program more closely than a liquor and wine pricing program in Virginia. Oregon 'neither establishes prices or reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any "pointed reexamination" of the program.' *MidCal*, *supra*, 445 U.S. at 105-06, 100 S.Ct. at 943. Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission 'may reject any price posting which is in violation of any of its rules,' Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. The similarities between the Oregon and California laws and the differences between the Oregon and Virginia laws indicate that Oregon, like California, does not meet the second prong of the two-prong *MidCal* test. Oregon merely authorizes and enforces the disputed pricing practices. *See MidCal*, *supra*, 445 U.S. at 105, 100 S.Ct. at 943. It does not '"displace unfettered business freedom" with its own power.' (citation omitted.)

688 F.2d at 1226-1227. *See also, Knudsen, supra.*

Disagreeing with this Ninth Circuit interpretation of prong two of the *MidCal* test are the Sixth Circuit in the case *Gambrel* v. *Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1198 (1983) and the Fourth Circuit in its decision below.

In both instances, the courts assumed that mere active enforcement of the challenged program is "active supervision of the state itself." As outlined *supra*, at 23-4, under this liberal interpretation, the second prong of *MidCal* is nullified. Such a broad definition of active supervision is directly contrary to *MidCal*, substantially weakens the antitrust proscriptions of the Sherman Act and incorrectly expands *Parker* far beyond this Court's intent. Such inconsistency of interpretation and result must be clarified and this Court should grant certiorari in order to establish the proper standards to be applied.

CONCLUSION

Whether considered separately or cumulatively, the errors committed by the courts below are so egregious and so plain that the petition for writ of certiorari should be granted, the judgment of the court of appeals reversed and judgment should be entered for petitioner.

Respectfully submitted,

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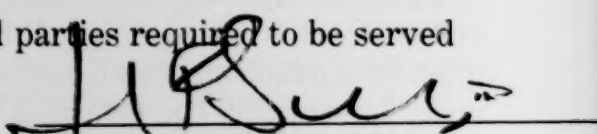
**Counsel of Record*

July 11, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 1984, three copies of this Petition and Appendix were mailed, postage prepaid, to counsel for the respondent, W.C. Harris, Esq. and F. Stephen Glass, Esq., Harris, Cheshire, Leager & Southern, P. O. Box 2417, Raleigh, North Carolina 27602.

I further certify that all parties required to be served have been served.



JOHN F. SHERLOCK, III
Counsel For Petitioner,
Flav-O-Rich, Inc.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 83-2066

FLAV-O-RICH, INC.,

Appellant,

v.

NORTH CAROLINA MILK COMMISSION AND ITS MEMBERS, HERBERT C. HAWTHORNE, VILA M. ROSENFELD, ANNA G. BUTLER, RUSSELL E. DAVENPORT CHARLIE L. HARDEE, INEZ M. MYLES, B.F NESBITT, KATHRYN G. KIRKPATRICK, AND DAVID A. SMITH,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. FRANKLIN T. DUPREE, JR., SENIOR DISTRICT JUDGE. (C/A 82-1172-CIV-5)

ARGUED APRIL 3, 1984 DECIDED APRIL 12, 1984

BEFORE WINTER, CHIEF JUDGE, WIDENER AND PHILLIPS, CIRCUIT JUDGES.

JOHN S. KECK (D. PAUL ALAGIA, JR., JOSEPH L. HAMILTON, BARNETT & ALAGIA; JERRY W. AMOS, REID L. PHILLIPS, BROOKS, PIERCE, McCLEN DON, HUMPHREY & LEONARD ON BRIEF) FOR APPELLANT; F. STEPHEN GLASS (W. C. HARRIS, JR., HARRIS, CHESHIRE, LEAGER & SOUTHERN ON BRIEF) FOR APPELLEES.

PER CURIAM:

Plaintiff sued the North Carolina Milk Commission praying a declaratory judgment and injunctive relief for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1. The action arose out of defendant's suspension of plaintiff's license to distribute milk in North Carolina as a result of plaintiff's refusal to make its records available in connection with an investigation of below-cost selling in violation of N.C.G.S. § 106-266.19. Plaintiff claimed, *inter alia*, that defendant disseminated confidential price information and stabilized prices in North Carolina in violation of the Sherman Act.

The district court granted summary judgment for defendant ruling that defendant had violated § 1 of the Sherman Act but that defendant and its activities were exempt from antitrust scrutiny under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. We agree.

We affirm the judgment of the district court for the reasons set forth in its memorandum of decision. *Flav-O-Rich, Inc.* v. *North Carolina Milk Commission*, No. 82-1172-Civ.-5, E.D.N.C., October 27, 1983 (unpublished).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 82-1172-CIV-5

FLAV-O-RICH, INC.,
Plaintiff,

v.

NORTH CAROLINA MILK COMMISSION AND
ITS MEMBERS, ETC.,
Defendants.

MEMORANDUM OF DECISION

Plaintiff, Flav-O-Rich, Inc., a milk processor-distributor, brought this action against the North Carolina Milk Commission and its members for declaratory and injunctive relief for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1]

The action is before the court on the parties' cross-motions for summary judgment. After hearing arguments on the motions and considering the submissions of the parties, the court is of opinion that although the question is a close one, that plaintiff's motion should be denied and defendants' motion granted.

On November 10, 1981, auditors from the Milk Commission requested Flav-O-Rich's Durham Division Office to disclose information on cost and prices for certain

[1] Plaintiff also alleged due process violations under 42 U.S.C. § 1983. Inasmuch as these claims were neither argued nor briefed by plaintiff in its motion for summary judgment, the court will treat them as waived. In addition the court finds that the disclosure requirement is rationally related to a legitimate state purpose. Thus this claim must be dismissed as without merit.

wholesale accounts. The information requested was to be used in connection with an investigation of below-cost selling in violation of N.C.G.S. § 106-266.19. Flav-O-Rich denied the auditors access to this information. On December 8, 1981 and May 3, 1982, the auditors again requested and were refused the information.

After giving plaintiff notice that it should appear and show cause why its license should not be revoked for refusing to make the records available, the Milk Commission, on May 25, 1982, conducted a hearing. At the hearing, Flav-O-Rich did not offer evidence opting instead to read a statement concerning the importance of confidential cost and price information. As a result of the hearing, the Milk Commission, on October 12, 1982, ordered that effective November 12 of that year the license of Flav-O-Rich, Inc., Durham Division, to distribute milk in North Carolina would be suspended. Plaintiff then brought this action seeking injunctive and declaratory relief. On November 5, 1982, the court granted plaintiff's motion for a preliminary injunction.

Although other issues are raised in the record the principal issue presented by these motions is whether the requirement by the North Carolina Milk Commission that Flav-O-Rich permit inspection of its records which results in an exchange of price information is exempt from the Sherman Act under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). When addressing the "state action" doctrine, the threshold issue of whether the activity violates the Sherman Act must be resolved. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In this instance, Flav-O-Rich is complaining of an exchange of price information which leads to price stabilization in violation of Section 1 of the Sherman Act. *United States* v. *Container Corporation*, 393 U.S. 333 (1969). In *Container Corpora-*

tion there was an exchange of specific sales and price information of identified customers. The court held that where the industry was dominated by relatively few sellers, the product is fungible, competition for sales is primarily through price and demand is inelastic, such that buyers place orders only for short term needs, the exchange tends toward price uniformity and is therefore illegal *per se*.

Plaintiff's exhibits clearly document exchanges of price information. Moreover, the milk industry in North Carolina is characterized by a small number of sellers and a large number of buyers. There is little perceptible difference between brands of milk and the primary means of competition among processor-distributors is aggressive pricing. Although small or moderate fluctuations in price do not have a significant effect on the volume of milk and dairy products sold, competition through price is only significant to the extent that an individual seller may increase its share of the market by taking customers away from its competitors. With the obvious short-term life span of milk, orders are, by necessity, placed on the basis of short-term needs. U der these circumstances, the court agrees with plaintiff that price exchanges would result in price stability in violation of *United States* v. *Container Corporation, supra.*

Having satisfied the initial requirement that the complained of activity violates the antitrust laws, the issue of whether the actions of the North Carolina Milk Commission are immune from the antitrust laws under the "state action" doctrine must be decided.[2]

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[2] Plaintiff has argued that this court's prior memorandum of decision accompanying the preliminary injunction forecloses consideration of this issue. This argument, however, misperceives the inquiry when a preliminary injunction is before the court. At that stage, the

In *Parker* v. *Brown*, the Supreme Court held that the federal antitrust laws did not prohibit a state, in the exercise of its sovereign powers, from imposing certain anti-competitive restraints. *Community Communications Company* v. *City of Boulder*, 455 U.S. 40 (1982). Cases interpreting the *Parker* v. *Brown* doctrine reveal that unless the activity is an act of the state, done in its sovereign capacity, or is that of a state agency under a clearly articulated and affirmatively expressed policy, *e.g.*, *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. at 105, the exemption is inapplicable. *Community Communications Company* v. *City of Boulder*, 455 U.S. at 52.

Defendants contend that because the Commission is an instrumentality of the state, N.C.G.S. § 106-266.8, the state was acting in its sovereign capacity and therefore immune from antitrust liability. Thus it is argued that the two-pronged *Midcal* analysis is unnecessary. *See, e.g.*, *Deak-Perera Hawaii* v. *Department of Transportation*, 553 F.Supp. 976 (Hawaii 1983). It is not the status of a defendant as an agency, however, which entitles it to the exemption. *City of Lafayette* v. *Louisiana Power & Light Company*, 435 U.S. 389 (1978). In *Deak*, for example, the defendant was the state department of transportation. Because the state can act only through its agents, the action of the state transportation department can be considered an act of the state itself. In contrast, defendant is a regulatory commission which acts much like the agency in *Midcal*. Accordingly, the two-pronged test is appropriate.

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court need only inquire whether serious questions of law are at issue. *Blackwelder Furniture Company* v. *Seilig Manufacturing Company*, 550 F.2d 189 (4th Cir. 1977). The decision was not, as plaintiff's argument presumes, a decision on the merits of the antitrust claim for relief.

Under the *Midcal* test, defendants must show first that the challenged activity is clearly articulated in affirmatively expressed state policy. To meet this test all that must be shown is that the agency is carrying out the mandate of the state. *City of Lafayette* v. *Louisiana Power & Light Company, supra* (Brennan, J., concurring). It may be derived "from the authority given a governmental entity to operate in a particular area. . . ." *Id.* at 415 (Brennan, J., concurring) (quoting the lower court opinion, 532 F.2d at 434). In addition, the mandate may be demonstrated by explicit language in the statutes or it may be inferred from the nature of the powers and duties conferred the agency. *Princeton Community Phone Book, Inc.* v. *Bate*, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

"[T]he purpose of the act creating the Milk Commission was to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to that end, to provide a fair price to the milk producer for his product." *North Carolina ex rel. North Carolina Milk Commission* v. *National Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). To carry out its mission, the Commission was given the power to examine records and require their production. N.C.G.S. § 106-266.8(5). To this end, the subpoena power could be invoked if necessary. *Id.* In addition, the legislature made it unlawful for anyone to sell milk below cost, N.C.G.S. § 106-266.19, and gave the Commission the power to investigate all matters pertaining to the production, processing, storage, distribution and sale of milk. N.C.G.S. § 106-266.8(2). The Commission also may act as mediator concerning controversial issues that may arise among or between producers or distributors. N.C.G.S. § 106-266.8(4). From these grants of power it is clear that the incidental exchange of price information of which plaintiff

complains falls within the affirmatively expressed and articulated state policy.

This is further evidenced by the acts of which plaintiff complains. Plaintiff asserts five areas in which price and cost exchanges occurred. Each instance, however, was a natural, consequence of the Commission carrying out explicit powers. For example, Flav-O-Rich complains that price and cost exchanges occurred because of direct contact between Commission members and processors. This occurs when processors inform the Commission that a competitor is believed to be charging below cost in violation of N.C.G.S. § 106-266.19. The Commission then begins an investigation in the area, N.C.G.S. § 106-266.8(2), and may later inform the complaining processor that the price is or is not below cost, or that there has been an adjustment, and the complainant must either meet the new cost or not charge below its cost. Thus the exchange occurs as a direct result of the investigation and the attempts to prevent below-cost sales in violation of the statute. Otherwise, continued below-cost sales would result in ruinous competition and threaten an orderly milk market, results the statute was explicitly designed to correct. *See* 1953 N.C. Sess. Laws Chapter 1338.

The second example of an exchange occurs at public hearings to determine if below-cost pricing in violation of N.C.G.S. § 106-266.19 has occurred. At the hearing, cost and price figures surely become exposed. However these hearings are expressly contemplated by the state, *id.*, and certainly such evidence must be explored to determine if below-cost sales have occurred. That the information in some sense becomes "exchanged" is only incidental to the procedure employed by the state to investigate below-cost pricing.

Thirdly, Flav-O-Rich complains of processors meeting with the Commission to discuss pricing. These meetings, however, are affirmatively authorized by the legislature. N.C.G.S. § 106-266.8(4). Additionally, the Commission has the power to set maximum and minimum retail and wholesale prices charged for milk. N.C.G.S. § 106.266.8(10)(b). This may occur after investigations and hearings have been conducted. *Id.* Meeting with processors to discuss this alternative and others which may stabilize the industry is certainly within the legislative mandate.

Fourth, plaintiff complains that because the Commission has two processors as members, whenever price or cost is discussed, an exchange occurs. However, N.C.G.S. § 106-266.7(a) requires the Speaker of the House to appoint two members to the Commission, one of whom must be a processor. The Commission of Agriculture, who appoints three members, must likewise appoint one who is a processor. *Id.* That they would be privy to Commission information could not be more expected.

The last example of information exchanging occurs through the media. While there is no statutory requirement that information be given to the press, the below-cost hearings are public and the press may freely attend. Moreover, it is not every exchange of information which constitutes a Sherman Act violation. *United States* v. *United States Gypsum Company*, 438 U.S. 422 (1978). It is doubtful that the occasional dissemination of information through the media constitutes a Sherman Act violation.

To summarize, the totality of the exchanges of price information of which plaintiff complains would normally amount to a violation of Section 1 of the Sherman Act. Yet, a review of the legislative mandate of the Milk

Commission discloses that these exchanges were authorized by the legislature as a clearly articulated and affirmatively expressed policy of the state. The exchanges occur as a natural result of the Commission's carrying out the very specific mandate to prevent below-cost pricing and investigate where it occurs. The Commission is also to investigate methods of maintaining stable markets and may fix wholesale and retail prices. Price information exchanges in this context clearly meet the first prong of the *Midcal* test.

The second prong of the test is also met. Not only is the Milk Commission to hold regular meetings, N.C.G.S. § 106-266.8(j), but the very active supervision of the below-cost statute with its consequent flow of price and cost information is the essence of this litigation. This supervision clearly meets the second prong of the test.

Accordingly, the "state action" doctrine of *Parker* v. *Brown* constitutes a defense to the action and the Commission's motion for summary judgment must therefore be granted and Flav-O-Rich's motion for summary judgment must be denied. An appropriate judgment shall be entered.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 27, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 82-1172-CIV-5

FLAV-O-RICH, INC.,

Plaintiff,

v.

NORTH CAROLINA MILK COMMISSION AND ITS MEMBERS, ETC.,

Defendants.

JUDGMENT

For the reasons stated in this court's memorandum of decision filed this day it is hereby

ORDERED that defendants' motion for summary judgment is granted, plaintiff's motion for summary judgment is denied and this action is dismissed.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 27, 1983.